

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

THE STATE OF FLORIDA, ex rel.
ROBERT A. BUTTERWORTH, and by
and through ROBERT A. BUTTERWORTH
as assignee of Toys "R" Us, Inc.,
Publix Super Markets, Inc. and
Winn-Dixie Stores, Inc.,

Plaintiff,

-against-

ABBOTT LABORATORIES, et al.,

Defendants.

Case No. 91-40002-MP

INDIVIDUAL CASE

AGREEMENT OF SETTLEMENT AND RELEASE

This Agreement of Settlement and Release ("Agreement") is entered into by and among Plaintiff the State of Florida (on its own behalf, including its departments, and as assignee of the Florida claims of Toys "R" Us, Inc., Publix Super Markets, Inc. and Winn-Dixie Stores, Inc.) (all of the above hereinafter collectively "Plaintiff") and Bristol-Myers Squibb Company and Mead Johnson & Company. The parties to this Agreement are referred to collectively hereinafter as "the Parties".

WHEREAS the above-captioned action (the "Action") is currently pending in the United States District Court for the Northern District of Florida (the "Court");

OFFICE OF CLERK
NORTHERN DISTRICT OF FLA.
TALLAHASSEE, FLA.
JAN 10 1992

Received
~~_____~~

WHEREAS the complaint and amended complaint in the Action allege, among other things, that Bristol-Myers Squibb Company acting through its subsidiary Mead Johnson & Company or divisions or subsidiaries of these companies, including the Mead Johnson Nutritional Group (hereinafter collectively "MJN"), participated in a conspiracy with Abbott Laboratories, American Home Products Corporation and/or with divisions, subsidiaries or affiliates of those companies (all of the above collectively hereinafter the "Defendants") in violation of Federal and/or state antitrust laws regarding pricing and marketing of infant formula products, or otherwise violated such laws;

WHEREAS Plaintiff alleges that pricing and marketing practices of MJN were unlawful only if such practices were done pursuant to a contract, combination or conspiracy with competitors; Plaintiff did not, does not and does not intend to allege that any completely unilateral practices of MJN regarding pricing or marketing of infant formula products (such as unilateral practices of marketing infant formula products to and through health care professionals or of refraining from advertising such products directly to consumers) have been or are unlawful;

WHEREAS MJN and defendant Abbott Laboratories are the two largest domestic competitors in the manufacture and

sale of infant formula products with historic aggregate shares of domestic sales volumes of over 85 percent;

WHEREAS MJN has denied and does deny all charges of wrongdoing of any kind whatsoever and has asserted affirmative defenses against the claims alleged in the complaint and amended complaint in the Action; and

WHEREAS MJN, without admitting any of the allegations in the Action or any liability whatsoever, has agreed to enter into this Agreement in order to reduce further expense, inconvenience and the distraction of burdensome and protracted litigation and in order to obtain the releases, covenants and final judgment contemplated by this Agreement and to put to rest with finality all claims that have been or that could have been asserted against MJN in the Action under any Federal or state antitrust law or any other laws.

NOW, THEREFORE, in consideration of the premises, covenants and agreements herein set forth, the sufficiency of which the Parties hereby acknowledge, it is agreed by and between the undersigned that the claims of Plaintiff against MJN be settled and compromised on the following terms and conditions:

1. As used in this Agreement, the term "Infant Formula Product" means a food, as described in 21 U.S.C.

§ 321(aa), which purports to be or is represented for special dietary use solely as a food for infants by reason of simulation of human milk or its suitability as a complete or partial substitute for human milk.

2. Simultaneously with the signing of this Agreement, the Parties shall execute for filing with the Court a Stipulation of Dismissal with Prejudice and Consent to Entry of Permanent Injunction (the "Stipulation and Consent") in the form annexed hereto as Exhibit A, together with an attachment consisting of a Permanent Injunction by Consent and Dismissal ("Permanent Injunction") in the form annexed hereto as Exhibit B. The fully executed Stipulation and Consent, along with the Permanent Injunction, shall be given and entrusted to counsel for Plaintiff for filing with the Court. The Parties agree that they will exercise their best efforts to obtain entry of the Permanent Injunction, will not seek to appeal such entry, will not seek to modify the Permanent Injunction except pursuant to paragraph 15 of this Agreement and paragraph 5 of the Permanent Injunction and will not take any action, directly or indirectly, which might prevent or delay the Permanent Injunction from becoming final.

3. Plaintiff, all of its respective officers, officials, agents, employees, predecessors, successors, departments, divisions, sections, agencies, affiliates and

representatives, and all of the respective assignors (past, current or future) to the extent of their Florida claims and assignees (past, current or future) of Plaintiff or any of the other persons or entities listed above in this sentence covenant and agree that they are hereby forever barred from instituting, assigning, maintaining, collecting, assisting or prosecuting against MJN or any of its past, present and future officers, directors, agents, employees, attorneys, affiliates, predecessors, shareholders, subsidiaries, divisions, successors, assigns, indemnitees (including Gerber Products Company) and legal representatives any and all claims, demands, actions, causes of action or liability of any nature, whether known or unknown, whether at law or equity, whether for damages, penalties or injunctive relief, which they ever had, now have, or could have had against MJN with respect to any and all purchases (whether made directly from MJN or another Defendant or from another party other than a Defendant), sales, marketing, pricing, or advertising of, or any other conduct relating to, any Infant Formula Product prior to the date of this Agreement or which could have been asserted or might in the future be asserted against MJN arising out of or related to any of the facts alleged in the complaint or amended complaint in the Action, whether based on Federal or state antitrust laws or any

other laws (all of the above collectively hereinafter the "Claims").

4. Plaintiff, all of its respective officers, officials, agents, employees, predecessors, successors, departments, divisions, sections, agencies, affiliates and representatives, and all of the respective assignors (past, current or future) to the extent of their Florida claims and assignees (past, current or future) of Plaintiff or any of the other persons or entities listed above in this sentence hereby release and discharge MJN and its past, present and future officers, directors, agents, employees, attorneys, affiliates, predecessors, shareholders, subsidiaries, divisions, successors, assigns, indemnitees (including Gerber Products Company) and legal representatives from any and all liability in respect of the Claims. Plaintiff shall advise counsel for MJN of any future assignment of claims to Plaintiff relating to the subject matter of this Action within one business day of such assignment, and shall confirm in writing that the covenants and releases of paragraphs 3 and 4 of this Agreement are applicable to such assigned claims.

5. (A) If the Court signs and enters the Permanent Injunction, and if the Permanent Injunction becomes final, then MJN shall deliver to Plaintiff the sum of \$4,000,000 (the "Settlement Fund") by transferring said

amount by wire transfer into an account entitled Florida State Treasury Concentration Account at Barnett Bank of Tallahassee in accordance with the request of Jerome W. Hoffman, Esq., Chief, Antitrust Section, on Plaintiff's behalf. This payment shall be in full, complete and final settlement of the Claims, including but not limited to any and all claims for damages, interest thereon, civil penalties, injunctive relief, attorneys' fees, expenses, costs and any other form of relief of any kind whatsoever. It is expressly understood that notwithstanding the fact that MJN's payment of the Settlement Fund shall be in full, complete and final settlement of all the claims asserted by Plaintiff against MJN in this Action, the Settlement Fund is not, and Plaintiff may not characterize the Settlement Fund as, anything other than a payment in respect of the claims assigned to the State of Florida by Toys "R" Us, Inc., Publix Super Markets, Inc. and Winn-Dixie Stores, Inc. In particular, no portion of the Settlement Fund is, and Plaintiff may not characterize any portion of the Settlement Fund as, a civil penalty or payment in respect of claims asserted by the State of Florida in its own right.

(B) If the Court declines to sign and enter the Permanent Injunction or if, prior to payment of the Settlement Fund, the Permanent Injunction is modified, reversed or set aside by a court for any reason whatsoever

other than pursuant to paragraph 15 of this Agreement and paragraph 5 of the Permanent Injunction, and such court's order becomes final and is not subject to appeal, then the following shall occur simultaneously:

(i) this entire Agreement, with the exception of paragraph 8 below, shall be completely rescinded and shall be deemed void ab initio, and of no force or effect, without prejudice to the claims, defenses or rights of the Parties;

(ii) all of Plaintiff's claims against MJN and all of MJN's answers and defenses thereto shall be immediately reinstated in the Action, as if this Agreement had never been entered;

(iii) the covenants and releases referred to in paragraphs 3 and 4 above shall be deemed null and void and of no force and effect; and

(iv) MJN shall have no obligation to deliver the Settlement Fund or any other sum of money to Plaintiff.

6. A primary objective of MJN in entering into this Agreement is to eliminate the burden and expense of continuing to participate in litigation. Accordingly, upon the execution of this Agreement, Plaintiffs (i) will withdraw all of their outstanding discovery requests against MJN and MJN's expert witnesses, (ii) will not seek any further discovery from MJN or its expert witnesses, (iii) will not

seek to compel any further production of documents, interrogatory answers or responses to requests for admission from MJN or its expert witnesses, (iv) will not seek to depose or participate in the deposition of any current or former employee of MJN or any of its expert witnesses, and (v) will not directly or indirectly initiate, encourage or assist any other plaintiff in any other action to engage in any deposition or other discovery directed at, or compel any deposition or other discovery from, MJN or its expert witnesses. The Parties further agree that pending the entry of a final judgment and the resolution of all appeals as to all parties in the Action and subject to the terms of the Protective Order on Consent in MDL No. 878, dated July 11, 1991, counsel for Plaintiff may retain the documents heretofore produced by MJN in MDL No. 878 and may seek to use such documents, as well as MJN's answers to interrogatories and the deposition transcripts of MJN officers and employees, as evidence in the Action or any related appeals.

7. This Agreement (i) shall not be deemed or construed to be an admission by any party of any fact or matter, (ii) does not constitute any evidence against or admission of liability by MJN with respect to any claim that was or could have been asserted against MJN by Plaintiff, and (iii) may not be used as evidence or in any other way in

this Action or in any other proceeding or litigation, except in connection with enforcement of this Agreement.

8. This Agreement does not settle or compromise any claim by Plaintiff asserted in the complaint or amended complaint in this Action against any Defendant other than MJN, and all of Plaintiff's rights against any other Defendant are specifically reserved. The sales of Infant Formula Product by MJN remain in this Action as a basis for damages claims against such nonsettling Defendants.

9. It is expressly understood that the terms stated in this Agreement are contractual and not merely recitals.

10. This Agreement may be executed in counterparts by the Parties.

11. The Court shall retain jurisdiction over the interpretation, effectuation and implementation of this Agreement.

12. This Agreement shall become effective upon its execution by all of the undersigned and cannot be amended or modified without the agreement in writing of all of the undersigned.

13. Plaintiff expressly warrants that the assignments of claims it has received are covered by this Agreement, were duly authorized by the corporate assignors and are valid and enforceable. Plaintiff further expressly

warrants that Plaintiff has the authority to settle the Claims with the releases and covenants reflected in this Agreement and that such releases and covenants are valid and enforceable.

14. The undersigned represent that they are fully authorized to enter into this Agreement on behalf of the respective Parties.

15. If Plaintiff's complaint in this Action against defendant Abbott Laboratories is resolved, whether through settlement, final judgment before or after trial, or otherwise, without injunctive, consent or other nonmonetary relief as against defendant Abbott Laboratories, then the Permanent Injunction, but not the releases to MJN or the dismissal with prejudice of MJN, shall be completely rescinded and vacated and shall be deemed void ab initio, and of no further force or effect. In addition, Plaintiff agrees that if the resolution of Plaintiff's complaint in this Action against defendant Abbott Laboratories through settlement, final judgment before or after trial, or otherwise, includes injunctive, consent or other non-monetary relief concerning advertising through the mass media directly to the consumer or WIC bidding, then provisions 8(a) to 8(c) (advertising) and/or 8(d) to 8(f) (WIC) of the Permanent Injunction shall, if requested by MJN, with the support of Plaintiff be modified as necessary

to make the provisions of the Permanent Injunction concerning such subjects conform to the relief provisions, or absence of such relief, concerning such subjects entered against defendant Abbott Laboratories. Within two (2) days of the resolution of Plaintiff's complaint in this Action against defendant Abbott Laboratories, Plaintiff shall certify to MJN in writing the absence of any injunctive, consent or other nonmonetary relief or the term(s) of any injunctive, consent or other nonmonetary relief.

12/10/, 1992

Robert A. Butterworth
Attorney General

by 

On behalf of Plaintiff The State of
Florida

Allen F. Maulsby
Douglas D. Broadwater
Max R. Shulman
Cravath, Swaine & Moore
Worldwide Plaza
825 Eighth Avenue
New York, New York 10019

by 

Counsel for Bristol-Myers Squibb
Company and Mead Johnson & Company